

574(e) (1) (B)
547(e) (2) (A)
Perfection
Preference

Long v. Joe Romania Chevrolet, Inc.

BAP No. OR-93-1970-MeOAS

In re Loken

Adv. No. 93-6038-H

Bankr. No. 691-65371-H13

12/2/94

BAP reversing PSH

Published

The defendant perfected its security interest in a motor vehicle 12 days after the security interest became effective between the parties. The trustee brought an action to avoid the security interest as a preferential transfer under § 547. Oregon law contains a 20 day grace period to perfect a security interest while § 547(e) (2) (A) allowed a 10 day grace period. The bankruptcy court ruled that the security interest was deemed perfected under state law on the effective date of the security agreement and the transfer was thus not an avoidable preference.

The BAP held that a security interest is perfected for purposes of 11 U.S.C. § 547 on the date when the holder of the security interest takes the last step required by state law to perfect its security interest. In this case, that step occurred on the date that the Dept. of Motor Vehicles (DMV) stamped the certificate of title for the vehicle, twelve days after the effective date of the security agreement. Since this was more than ten days from the date the actual transfer took place, the transfer was an avoidable preference under § 547.

E94-20 (15)

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

DEC 2 1994

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BY AS DEPUTY

In re

RICHARD K. LOKEN and
SHELLEY R. FOX-LOKEN,

Debtors.

FRED LONG, Chapter 13
Trustee,

Appellant,

v.

JOE ROMANIA CHEVROLET, INC.,

Appellee.

BAP No. OR-93-1970-MeOAS

Bk. No. 691-65371-H13

Adv. No. 93-6038-H

FILED

DEC 2 1994

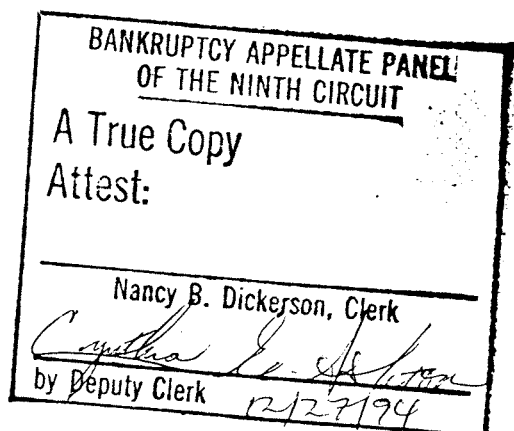
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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

J U D G M E N T

ON APPEAL from the United States Bankruptcy Court for
the District of Oregon.

THIS CAUSE came on to be heard on the record and the
briefs of the parties.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by
this Panel that the judgment of the Bankruptcy Court is REVERSED.



FOR THE PANEL,

Nancy B. Dickerson
Panel Clerk

By: *Edwina M. Clay*
Edwina Clay
Deputy Clerk

ORDERED PUBLISHED

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re

RICHARD K. LOKEN

and

SHELLEY R. FOX-LOKEN,

Debtors.

BAP No. OR-93-1970-MeOAs

Bankruptcy No. 691-65371-H13

Adversary No. 93-6038-H

FRED LONG, Chapter 13 Trustee,

Appellant,

v.

JOE ROMANIA CHEVROLET, INC.,

Appellee.

OPINION

Submitted on the Briefs
January 20, 1994 at Portland, Oregon

Filed: DEC - 2 1994

Appeal from the United States Bankruptcy Court
for the District of Oregon

Hon. Polly S. Higdon, Bankruptcy Judge, Presiding

Before: MEYERS, OLLASON and ASHLAND, Bankruptcy Judges

MEYERS, Bankruptcy Judge:

1 I

2 A car dealer perfected its security interest in a motor
3 vehicle twelve days after the security interest became effective
4 between the parties. The bankruptcy trustee brought an action to
5 avoid the security interest pursuant to Bankruptcy Code ("Code")
6 Section 547. Oregon law contains a twenty day grace period for
7 perfection of such interests. The bankruptcy court ruled that the
8 Oregon law was made applicable through Section 547(e)(1)(B). The
9 trial court found the transfer of the security interest would be
10 deemed perfected on the same date the interest was effective between
11 the parties. Therefore, the court found in favor of the dealer on
12 the basis that the transfer was not made on account of an antecedent
13 debt.

14 We REVERSE.

15
16 II

17 **FACTS**

18 The parties stipulated to the facts. On October 19, 1991,
19 Shelley Fox-Loken ("Loken") purchased a car from Joe Romania
20 Chevrolet, Inc. ("Romania") and took possession of it that day.
21 Loken signed a promissory note and granted Romania a purchase money
22 security interest in the vehicle.

23 Under Oregon law, a security interest in a motor vehicle is
24 perfected when a notation of the interest is made on the vehicle's
25 certificate of title. Generally, the notation of interest is
26 considered made as of the date a complete application for notation

1 is received by the Oregon Department of Motor Vehicles ("DMV").
2 Romania applied for such a notation. The application was marked
3 received by the DMV twelve days after Loken took possession of the
4 vehicle.¹ The tenth and eleventh days were not weekend days or
5 holidays.

6 Loken filed for relief under Chapter 13 of the Code on December
7 10, 1991, and Fred Long was appointed trustee ("Trustee"). The
8 Trustee filed an adversary proceeding against Romania alleging that
9 the granting of the security interest was a preference under Section
10 547(b).

11 Romania did not file an answer. Instead, Romania and the
12 Trustee entered into a stipulation narrowing the proceeding to two
13 issues. The first was whether the security interest took effect on
14 the date of the security agreement, October 19, under Section
15 547(e)(2)(A). Essentially, this issue boiled down to whether there
16 was a transfer on account of an antecedent debt under Section
17 547(b)(2). The second issue was whether the transfer amounted to an
18 enabling loan under Section 547(c)(3) which could not be avoided.
19 The parties further waived the right to a trial and submitted the
20 matter on the briefs.

21 The bankruptcy court ruled that the transfer was not made on
22 account of an antecedent debt. In re Loken, 156 B.R. 660 (Or.
23 1993). The court noted that Oregon law gave Romania twenty days to
24 perfect the security interest and that such perfection would then

25 ¹ The application listed Seattle First National Bank
26 ("SeaFirst") as the secured creditor. SeaFirst subsequently
assigned the security interest back to Romania.

1 relate back if achieved in that twenty day period. Romania
2 perfected on day twelve, and consequently, perfection was deemed to
3 have occurred on day one, October 19, 1991. Looking to Section
4 547(e)(2)(A), the court found that the transfer was made on October
5 19, 1991, because it was perfected within ten days of the date the
6 interest became effective between the parties. Since the transfer
7 was made the same day the debt arose, the transfer could not have
8 been made on account of an antecedent debt as required by Section
9 547(b)(2). The trial court dismissed the proceeding because an
10 essential element of the preference claim was lacking. It did not
11 reach the issue of whether the enabling loan exception applied.²
12

13 III

14 STANDARD OF REVIEW

15 Questions of statutory interpretation are reviewed de novo. In
16 re Orvco, Inc., 95 B.R. 724, 726 (9th Cir. BAP 1989). Likewise,
17 when a transfer occurs for purposes of Section 547 is a question of
18 law which we review de novo. In re Schuman, 81 B.R. 583, 585 (9th
19 Cir. BAP 1987).
20

21 IV

22 DISCUSSION

23 Section 547 allows a trustee to avoid any transfer to or for
24

25 ² Both Section 547(e) and Section 547(c)(3) focus on the time
26 a transfer is perfected. Our analysis of "perfection" under Section
547(e) is equally applicable to the use of that term in Section
547(c)(3).

1 the benefit of a creditor, on account of an antecedent debt owed by
2 the debtor, made while the debtor was insolvent, which was made
3 within 90 days of the filing of the bankruptcy petition (or one year
4 if the creditor is an insider) and which enables the creditor to
5 receive more than the creditor would have received under Chapter 7.
6 11 U.S.C. § 547(b). The perfection of a security interest is a
7 transfer for purposes of Section 547. 11 U.S.C. § 101(58). If a
8 security interest is perfected more than ten days after it is given,
9 the transfer will be treated as having been made on account of an
10 antecedent debt. In re Gulino, 779 F.2d 546, 552 (9th Cir. 1985).
11 See also Matter of Vance, 721 F.2d 259, 262 (9th Cir. 1983) (the
12 contemporaneous exchange for value exception under Section 547(c)(1)
13 does not apply to purchase money security interests). We must
14 determine when the transfer of the security interest was made in
15 order to determine if there was a transfer on account of an
16 antecedent debt.

17 Section 547(e)(2) provides that:

18 [A] transfer is made --

19 (A) at the time such transfer takes effect between the
20 transferor and the transferee, if such transfer is
perfected at, or within 10 days after, such time;

21 (B) at the time such transfer is perfected, if such
22 transfer is perfected after such 10 days; or

23 (C) immediately before the date of the filing of the
petition, if such transfer is not perfected at the later
24 of --

(i) the commencement of the case; or

25 (ii) 10 days after such transfer takes effect between
the transferor and the transferee.

26 The parties do not dispute that the security interest "took

1 effect between the transferor and transferee" on October 19, 1991,
2 when Loken signed the security agreement and took possession of the
3 vehicle. The issue is when the transfer was perfected for purposes
4 of Section 547(e)(2). If the transfer of the security interest to
5 Romania was perfected within ten days of October 19, it will be
6 treated as having been "made" on that date pursuant to Section
7 547(e)(2)A). If it was perfected outside that ten day window, after
8 October 29, 1991, it will be considered "made" at the time it was
9 perfected under Section 547(e)(2)(B).

10 Determining perfection requires us to turn to Section
11 547(e)(1)(B), which states that:

12 (1) For purposes of this section --

13 (B) a transfer of a fixture or property other than
14 real property is perfected when a creditor on a
15 simple contract cannot acquire a judicial lien that is
superior to the interest of the transferee.

16 In other words, Romania's security interest was perfected when
17 another creditor could not acquire a superior judicial lien. "'What
18 constitutes a transfer and when it is complete' is a matter of
19 federal law." Barnhill v. Johnson, ___ U.S. ___, 112 S.Ct. 1386,
20 1389 (1992) (quoting McKenzie v. Irving Trust Co., 323 U.S. 365,
21 369-70 (1945)). However, federal law does not provide the answer to
22 how a transferee protects its rights against a judicial lien
23 creditor. We must turn instead to the applicable state law to
24 determine the method for perfecting a security interest as against
25 a judicial lienholder. Matter of Hamilton, 892 F.2d 1230, 1232 (5th
26 Cir. 1990).

In Oregon, a creditor perfects its interest in a motor vehicle

1 by applying for notation of the security interest on the certificate
2 of title. O.R.S. § 803.097(1). If the application contains all the
3 necessary information, and is accompanied by all of the required
4 documentation, "the security interest is perfected as of the date
5 marked by the division on the application." O.R.S. § 803.097(3).

6 We must also determine what effect to give O.R.S. § 79.3010,
7 Oregon's version of Uniform Commercial Code § 9-301, which provides
8 that a secured party perfecting a purchase money security interest
9 within twenty days of the debtor receiving the collateral, takes
10 priority over the rights of a lien creditor arising within that
11 period. By this statute, Oregon has expanded the time period for
12 perfection of purchase money security interests from that provided
13 in the Uniform Commercial Code. Romania's application was date
14 marked October 31, 1991. This was within twenty days of October 19,
15 when Loken received possession of the collateral. Under the trial
16 court's analysis, perfection should be related back and treated as
17 having occurred on October 19.

18 This concept, that state law "relation-back" statutes should be
19 applicable, has led to a split in authority. There is certainly
20 support for the bankruptcy court's position. Two circuit courts
21 have taken this stance. See, In re Hesser, 984 F.2d 345, 349 (10th
22 Cir. 1993); In re Busenlehner, 918 F.2d 928, 931 (11th Cir. 1990).
23 See also In re Burnette, 14 B.R. 795, 801 (E.Tenn. 1981). There is
24 also ample support for the contrary position. See In re Hamilton,
25 supra, 892 F.2d at 1235; In re Holloway, 132 B.R. 771, 773 (N.Okla.
26 1991); In re Holder, 94 B.R. 395, 398 (M.N.C. 1988); In re Scoviac,

1 74 B.R. 635, 637-38 (N.Fla. 1987).

2 The Panel is in the fortunate position of being able to
3 consider two recent excellent opinions from bankruptcy courts in the
4 Ninth Circuit which clearly set forth the arguments of the two
5 schools of thought. On the one hand, there is Judge Higdon's
6 opinion below which holds that the perfection should relate back.
7 On the other hand, there is Judge Pappas's opinion in In re Walker,
8 161 B.R. 484, 501 (Idaho 1993), aff'd No. CV 93-0498-E (D.Idaho
9 1994), published after the ruling below, which holds that the state
10 relation-back statute is inapplicable. We respectfully disagree
11 with the ruling of the bankruptcy court in the instant case, finding
12 instead that we are more persuaded by Judge Pappas's opinion and
13 those cases which hold that state law grace periods are inapplicable
14 under Section 547(e). We base our holding on two factors. First,
15 we believe the language of the statute itself compels this result.
16 In that respect only, we respectfully disagree with Judge Pappas who
17 found the language of the statute to be ambiguous. Second, it is
18 undisputed that Congress drafted this Section with this result in
19 mind.

20 The thought that the language of Section 547(e)(1) is ambiguous
21 is discussed in Walker, supra, 161 B.R. at 492-93. The word
22 "perfected" could refer to the taking of the last step necessary to
23 perfect an interest. Under this definition, Romania's security
24 interest was perfected when the application for notation was marked
25 by the DMV. Another argument is that "perfected" might refer to the
26 status of the security interest during a period of time. 161 B.R.

1 at 493. If that were the case, it could be argued that Romania's
2 security interest was perfected throughout the whole period from
3 October 19 to October 31 because of the effect of the Oregon grace
4 period.

5 Looking at the plain language of Section 547(e)(1), taken as a
6 whole, we find that an ambiguity does not exist. The term
7 "perfected" must be viewed in the context of the rest of the Section
8 and with regard for the usual usage of that term. Section 547(e)(1)
9 states that a transfer is perfected when a creditor "cannot" acquire
10 a superior interest. This Section directs courts to determine when
11 a judicial lienholder is not able to obtain a position superior to
12 that of the transferee in question. See In re Lane, 980 F.2d 601,
13 625 (9th Cir. 1992) (applying Section 547(e)(1)(A) - the
14 definition of transfer is "unambiguous;" a transfer is perfected
15 when a subsequent purchaser cannot acquire a superior interest). If
16 a judicial lienholder could still obtain superior rights, then the
17 transfer has not been perfected such that the lien holder "cannot"
18 obtain superior rights. Essentially, under Section 547(e)(1), the
19 court must determine the moment in time when a judicial lien
20 creditor is barred from obtaining superior rights. This is a
21 natural reading of the complete Code Section. The courts that have
22 reached a different conclusion have taken the word "perfected" out
23 of the context of the remaining words of the statute. We hold that
24 a creditor on a simple contract is barred from acquiring a judicial
25 lien superior to the interest of the transferee when the transferee
26 takes the last step required by state law to perfect its security

1 interest. Until that last step is taken, other creditors could
2 potentially obtain superior rights. Until this last step, it is not
3 possible to say that other creditors "cannot" obtain superior
4 rights.

5 This interpretation, that the term "perfected" refers to that
6 single date, or moment in time, when the state perfection statute is
7 satisfied, is also consistent with the general usage of the term.
8 See In re Holloway, supra, 132 B.R. at 774 ("[I]n the real world
9 perfection is actually accomplished on a particular date by doing a
10 particular act."). A perfect example is the Oregon statute at issue
11 here. The Oregon statute requires that an application for notation
12 of the interest on the certificate of title be sent to the DMV. The
13 application must be accompanied by certain documentation. The
14 application is marked when it is received by the DMV. The final act
15 required by the Oregon statute is the submission of a completed
16 application and supporting documentation. If everything is in
17 order, "the security interest is perfected as of the date marked by
18 the [DMV] on the application." O.R.S. § 803.097(3) (emphasis
19 added). The last act required by Oregon law is the submission of a
20 completed application and supporting documentation to the DMV. Once
21 it is confirmed that this has been done properly, Oregon treats this
22 last required act as the moment the security interest is perfected.
23 This is simply how the term perfected is used in common usage.

24 Since this issue has produced such divergent views we also will
25 look at the history of this Code section and the legislative intent
26 behind it. The first thing we note is that Congress intended to

1 harmonize the preference statute with the Uniform Commercial Code.

2 [T]he adoption of the Uniform Commercial Code radically
3 altered the terminology of secured transactions, and the
4 courts have applied the new terminology to the preference
5 sections, which uses certain of the same words as the
6 Uniform Commercial Code but in different senses and with
different meanings. It is time to bring the two statutes
into harmony, and H.R. 8200 does that by adopting the more
modern terminology of the Uniform Commercial Code, and
providing for specific treatment of transfers by the Code.

7 H.Rep. No. 595, 95th Cong., 1st Sess. 179 (footnotes deleted).³

8 This statement is consistent with our holding that Section 547(e)(1)
9 must be read in accordance with general commercial usage.

10 The Bankruptcy Act ("Act") set a twenty-one day time limit for
11 perfection of transfers. Under Section 60(a)(7) of the Act, the
12 time period would be shorter if state law provided for less time to
13 perfect. However, while state law might provide for less time,
14 Section 60(a)(7) clearly prohibited the use of a state statute to
15 expand the twenty-one days maximum time limit. Congress's reason
16 for changing the timing of Section 60(a)(7) to the ten day time
17 period of Code Section 547(e)(2) is clear. Congress made the change
18 to create a uniform rule throughout the country and it did not
19 intend for state grace periods to be relevant under Section 547. In
20 re Burnette, supra, 14 B.R. at 801. Congress set the grace period
21 at ten days to correspond with the grace period provided under the
22 Uniform Commercial Code. See In re Walker, supra, 161 B.R. at 495
23 (quoting White and Summers, Uniform Commercial Code § 25-7, 447-48
24 (3d ed. 1988)). See also Burnette, supra, 14 B.R. at 800. Congress

25

26 ³ The footnotes in the original text reference Section 547(e)
and 547(c)(3), (4) and (5).

1 could have provided that each state's own version of Uniform
2 Commercial Code Section 9-310(2) would be applicable. Then states,
3 such as Oregon, could have adopted changes as they saw fit.
4 However, Congress did not do this. Instead, it created one uniform
5 grace period of ten days.

6 We also take note of Congress's enactment of the Bankruptcy
7 Reform Act of 1994, which was signed into law on October 22, 1994.⁴
8 The Reform Act now allows a creditor twenty days to perfect its
9 purchase money security interest while still qualifying for the
10 enabling loan exception found in Section 547(c)(3).⁵ By this
11 change, Congress acknowledged that states were enacting grace
12 periods greater than ten days for such security interests. Congress
13 could have deferred completely to the states by incorporating each
14 state's own timing into the Code. Instead, it chose to continue
15 having the Code itself dictate the applicable grace period.
16 Furthermore, Congress did not amend Section 547(e)(1), which
17 provides the definition for "perfection" as used in Section 547.

18 Even under the Reform Act then, if a creditor perfects its
19 interest more than ten days after the transfer is effective between
20 the parties, the transfer will be deemed made on the date of

21 ⁴ Bankruptcy Reform Act of 1994, Pub. L. No. 103-393, 108 Stat.
22 4106 (codified as amended in various sections of 11 U.S.C.).

23 ⁵ Section 547(e)(2)(A) also was amended, but only to make
24 specific reference to Section 547(c)(3). Section 547(e)(2) now
provides that a transfer is made -

25 (A) at the time such transfer takes effect between the
26 transferor and transferee, if such transfer is perfected at, or
within 10 days after, such time, except as provided in
subsection (c)(3)(B). (Language added by amendment is
underscored).

1 perfection, and a preference may therefore exist. If it is
2 perfected within ten days, the transfer is deemed made as of the day
3 it became effective between the parties. Under such circumstances,
4 there will have been no transfer on account of an antecedent debt,
5 and hence, no preference. The only difference under the new law is
6 that lienholders asserting purchase money security interests, who
7 perfect their interest within twenty days of the debtor taking
8 possession of the property in question, may now be able to interpose
9 Section 547(c)(3) as a defense to a preference action.⁶ For all
10 purposes of Section 547 though, be it to determine if there was a
11 transfer on account of an antecedent debt or if the enabling loan
12 exception applies, perfection is still determined pursuant to
13 Section 547(e), and is still determined without any reference to
14 state grace periods.

15 The Panel now applies this law to the facts at hand. The
16 parties agree that Romania's application for a notation of the
17 security interest on the certificate of title was marked October 31,
18 1991. Clearly then, since there is no other mark on it, the
19 application was received by the DMV on that date, it contained all
20 the required information and it was accompanied by all necessary
21 documentation. The security interest was perfected on October 31,
22 1991. See O.R.S. 803.097(3). On that date, Romania cut off any
23 possibility that a judicial lien creditor could obtain superior
24

25 ⁶ The Bankruptcy Reform Act applies only to cases filed after
26 its enactment. See Section 702 the Bankruptcy Reform Act of 1994.
Therefore, the change to 20 days is of no use to Romania in this
action.

1 rights in the collateral. The relation back effect of O.R.S.
2 § 79.3010(2) is inapplicable. Since the interest was perfected
3 twelve days after the transfer took effect between the parties,
4 Section 547(e)(2)(A) is not applicable. Instead, pursuant to
5 Section 547(e)(2)(B) the transfer to Romania is deemed to have been
6 made on October 31, 1991. Consequently, the transfer of the
7 security interest to Romania was made on account of an antecedent
8 debt.

9
10 **V**

11 **CONCLUSION**

12 The plain language of Section 547(e)(2) provides that a secured
13 creditor will have a ten day grace period for perfecting its
14 security interest. Pursuant to Section 547(e)(1), courts must look
15 to state law to determine the moment in time in which the last step
16 is taken to perfect a security interest. Varying grace periods
17 provided for under state law are irrelevant. If the last necessary
18 act was done within the ten day period of Section 547(e)(2)(A), the
19 transfer will have been made when it became effective between the
20 parties. If it is made after the ten day period, it will have been
21 made when perfected under Section 547(e)(2)(B).

22 The security interest was effective between Loken and Romania
23 on October 19, 1991. The DMV stamped Romania's application as
24 received on October 31, 1991. The security interest was perfected
25 on that date. This was beyond the ten day grace period allowed.
26 Therefore, under Section 547(e)(2)(B), the transfer of the security
interest is treated as made on October 31, 1991, and not October 19,

1991. Consequently, the transfer was made on account of an antecedent debt under Section 547(b)(2) and that essential element of the preference claim was met.

REVERSED.

BAP No. OR-93-1970-MeOAs
Bk No. 691-65371-H13
Adv. No. 93-6038-H

PROOF OF SERVICE OF MANDATE

I, Cynthia E. Ashton, sent a certified copy of the attached
judgment

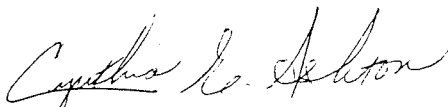
to APPEALS CLERK

U. S. Bankruptcy Court

at P.O. Box 1335
(address)

Eugene, Oregon 97440

on December 27, 1994
(date)



Cynthia E. Ashton
Deputy Clerk